Supreme Court, U.S.
FILED
CLERK

NO. 81-2243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RONALD FINCHER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

JANICE G. HILDENBRAND
Staff Assistant
Attorney General
Counsel-of-Record
for Petitioner

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please serve:

JANICE G. HILDENBRAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-6344

QUESTION PRESENTED

I.

Whether the affidavit, based on information provided by a reliable informant, is constitutionally sufficient to support the issuance of a search warrant in this case?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
REASONS FOR NOT GRANTING THE WRIT	
I. THE GEORGIA COURT OF APPEALS PROPERLY DETERMINED THAT THE AFFIDAVIT ESTABLISHED PROBABLE CAUSE TO AUTHORIZE ISSUANCE OF A SEARCH WARRANT	2
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Cases

Aguilar v. Texas, 378 U.S. 108 (1964) 3, 4

Spinelli v. United States, 393 U.S. 410 (1969) 4, 5

State v. Fincher, 161 Ga. App. ____ S.E.2d ____ (1982) 2

United States v. Carmichael, 489 F.2d 983 (7th Cir. 2973) 6

United States v. Jenkins, 525 F.2d 819 (8th Cir. 1975) 6

United States v. McCoy, 478 F.2d 176 (10th Cir. 1973) 6

United States v. Skramstad, 649 F.2d 1259 (8th Cir. 1981) 6

United States v. Smith, 462 F.2d 456 (8th Cir. 1972) 4, 5, 9

United States v. Ventrusca, 380 U.S. 102 (1965) 6

NO. 81-2243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RONALD FINCHER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

On February 20, 1981, Hubert T. Hutto, Judge, Magistrate's Court of Athens, Clarke County, Georgia, issued a search warrant for Petitioner's residence on the basis of an affidavit executed by Lieutenant George Garrison, of the City of Athens Police Department. As a result of the search, cocaine, methamphetamine and marijuana were discovered at Petitioner's residence.

During the April Term, 1981, Petitioner was indicted for three violations of the Georgia Controlled Substances Act. Petitioner's motion to suppress evidence was granted by the trial court on the basis that the underlying affidavit was insufficient because, although the reliability of the

principal informant (Source A) was established, the trial judge found no basis for establishing Source B's reliability.

The trial court's decision was reversed by the Georgia Court of Appeals; that Court found that "Source A sufficiently verified Source B's story through his direct observation so as to establish a substantial basis for crediting the hearsay of the second source." *State v. Fincher*, 161 Ga. App. 556, 557, ____ S.E.2d ____ (1982).

On April 8, 1982, the Georgia Supreme Court, with all Justices concurring, denied Petitioner's application for certiorari to review the decision of the Georgia Court of Appeals.

PART TWO

SUMMARY OF ARGUMENT

Repondent maintains that the affidavit presented in this case contained credible information which had been related to a law enforcement officer by a reliable informant. The fact that the affidavit contains "hearsay on hearsay" is not dispositive because the information provided, taken as a whole and in light of the underlying circumstances, is reliable.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE GEORGIA COURT OF APPEALS PROPERLY DETERMINED THAT THE AFFIDAVIT ESTABLISHED PROBABLE CAUSE TO AUTHORIZE ISSUANCE OF A SEARCH WARRANT.

The affidavit underlying the search warrant issued in this matter was executed by Lieutenant Garrison, of the Athens Police Department, who initially stated that

Source A had been known to him for three years, had provided reliable and truthful information on a regular basis and was concerned about the drug traffic problem. Petitioner does not dispute that Source A's reliability was adequately established. *See* Petitioner's Brief, page 4. After enumerating Source A's credentials, the substance of the affidavit was set forth:

> Source A stated that it was contacted by a second source, hereafter referred to as Source B. Source B stated to Source A within ten days of February 20, 1981 that it could get some cocaine from the above-described premises. Within this ten days of February 20, 1981, Source A and Source B went to the above-described premises and Source B came back to Source A's vehicle and exhibited what was represented to be cocaine by Ronald Fincher to Source A. Source B further stated to Source A it would be able to get more at anytime. Affiant personally observed the above residence for the physical appearance. A check with local utilities shows Ronald Fincher to reside at the above premises.
>
> For the above reasons affiant has probable cause to believe there is now a quantity of cocaine within the above-described premises.

Petitioner argues that this affidavit does not satisfy the probable cause requirements of the Fourth Amendment under this Court's decision in *Aguilar v. Texas*, 378 U.S. 108 (1964) and later cases because the magistrate was not informed as to the reliability of Source B or his information.

The well-established test, for assessing the constitutionality of search warrants issued on the basis of affidavits containing hearsay information from informants,

is set forth in *Aguilar v. Texas*, *supra*, 378 U.S. at 114:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725, 78 A.L.R. 2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, *See Rugendorf v. United States*, 376 U.S. 528, 11 L.Ed.2d 887, 84 S.Ct. 825, was "credible" or his information "reliable." (Footnote deleted).

In addition, this Court has held that the magistrate's "determination of probable cause should be paid great deference by reviewing courts. *Jones v. United States*, 362 U.S. 257, 270-71." *Spinelli v. United States*, 393 U.S. 410, 419 (1969).

Respondent maintains that the present case is controlled by the Eighth Circuit's decision in *United States v. Smith*, 462 F.2d 456 (8th Cir. 1972), where the Court upheld the sufficiency of an affidavit under facts virtually identical to the present case. The affidavit was executed by a federal agent and read, in pertinent part:

> On May 13, 1971, I interviewed a confidential informant who advised (sic) that within the last two days he went to 678 Concordia, St. Paul, Minnesota with a second individual. The informant previously advised the second individual that the informant wished to buy heroin. The second individual advised that Larry Smith had heroin and cocaine. The second individual went to the second floor of 678 Concordia Avenue. The second individual returned and gave the informant a foil package of heroin. The informant advised that Larry Smith resides on the second floor of

> 678 Concordia. I ran a Narcodal test on the powder which the informant obtained. The test indicated the powder of an opiate derivative. The second individual advised the informant that in addition to heroin, there was cocaine on the second floor.

Respondent maintains the fact that the substance was tested in *United States v. Smith, supra,* is not significant because in the present case Source A, who is regularly employed in drug cases, apparently recognized the substance as cocaine and it is unlikely that Petitioner would have provided a substance other than cocaine when seeking to establish an on-going dealer-buyer relationship with Source B.

In *United States v. Smith, supra,* the Eighth Circuit concluded that the magistrate "need not categorically reject this double hearsay information. Rather, he is called upon to evaluate this information as well as all other information in the affidavit in order to establish whether it can be reasonably inferred 'that the informant had gained his information in a reliable way.' *Spinelli, supra,* 393 U.S. at 417." *United States v. Smith, supra,* 462 F.2d at 459. The court concluded:

> The crucial question here, however, is not as suggested by Appellant, whether affiant can attest to the reliability or credibility of the second individual, but *whether the information furnished by the informant taken as a whole in light of the underlying circumstances, can be said to be reliable.* The affidavit need only establish the *probability* of criminal activity and secreting of evidence on specific premises, not proof beyond a reasonable doubt. (Citations omitted, emphasis added). *Id.* at 460.

This standard, as enunciated in *United States v. Smith, supra,* for evaluating hearsay on hearsay in affidavits has been widely accepted by the federal appellate courts. *See*

United States v. Skramstad, 649 F.2d 1259, 1263 (8th Cir. 1981), *United States v. McCoy*, 478 F.2d 176, 179 (10th Cir. 1973), *United States v. Jenkins*, 525 F.2d 819, 823 (6th Cir. 1975) and *United States v. Carmichael*, 489 F.2d 983, 986 (7th Cir. 1973).

Respondent maintains, as the Georgia Court of Appeals found, that the information provided by Source A "taken as a whole in light of the underlying circumstances" was properly accepted by the magistrate as reliable. Most significant, is that Source A, an undisputedly reliable informant, personally observed Source B enter the premises and return with the contraband. This Court has repeatedly held that such an affidavit must be treated in a "common place and realistic fashion." *United States v. Ventrusca*, 380 U.S. 102, 108 (1965). Evaluating the facts under that standard, it would not be unusual that the informant, known to the officer-affiant, would be unable to personally consummate the drug purchase if the seller is reasonably cautious about the illegality of his business.

Accordingly, the magistrate properly issued a search warrant in this case because the underlying affidavit contained reliable and credible information.

CONCLUSION

Based on the foregoing, Petitioner has failed to present any argument warranting review by this Court. In light of this Court's considerations, under Rule 17, for granting certiorari, this case is neither contradictory to any precedent of this Court nor does it involve any question of law which has not been settled by this Court. Therefore, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

/s/
MARION O. GORDON
First Assistant Attorney General

/s/
WILLIAM B. HILL, JR.
Senior Assistant Attorney General

/s/
JANICE G. HILDENBRAND
Staff Assistant Attorney General
Counsel-of-Record for Petitioner

Please serve:
JANICE G. HILDENBRAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-6344

CERTIFICATE OF SERVICE

I, JANICE G. HILDENBRAND, a member of the bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of the same in the United States Mail with proper address and adequate postage to:

Mr. Andrew H. Marshall
Henry & Marshall
P. O. Box 808
Athens, Georgia 30603
Attorneys for Petitioner

This 15th day of October, 1982.

/s/
JANICE G. HILDENBRAND
Counsel-of-record for Respondent